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THESIS

DISPUTES RESOLUTION IN
NAVY PUBLIC/PRIVATE
COMPETITION

by

Vernon F. Caldwell

December, 1993

Thesis Advisor:

Jeffery Warmington

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Disputes Resolution in
Navy Public/Private
Competition

by

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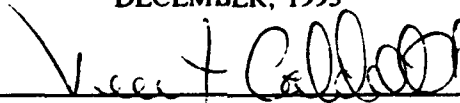
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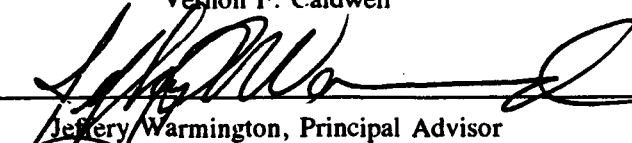
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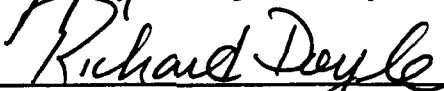


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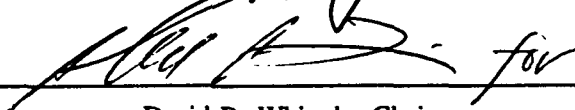
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ABSTRACT

Competition between public activities and private companies for aviation depot level maintenance began in 1987. Since then numerous areas of concern have developed in the public/private arena. One such area is dispute resolution. This thesis addresses the disputes resolution process currently utilized by Naval Air Systems Command (NAVAIR). The current administrative process essentially uses the Naval Aviation Depot (NADEP) chain of command. This method works well when NAVAIR and its subordinate activities are involved. However, the introduction of Defense Contract Management Command (DCMC) to administer the "contracts" and the addition of other Services' depots competing for these awards have forced NAVAIR to readdress its disputes process. The Federal Acquisition Regulation (FAR) does not apply to public performing activities, but it is NAVAIR's policy that their public/private process will operate as if it did. With this in mind, the disputes process should mirror the process delineated in the FAR. The litigation portion of the disputes resolution process outlined in the FAR does not apply to public activities, because the Government cannot sue itself. Therefore, NAVAIR's dispute resolution process should take the form of Alternate Disputes Resolution (ADR) as delineated in the FAR.

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I. INTRODUCTION

A. INTRODUCTION

In 1985 Congress provided for a test program in which the Navy would compete two or more ship overhauls between public and private shipyards.[Ref. 1:OMN] As a result, the issue of how a Government Agency can contract with a subordinate activity and maintain a fair and level playing field with the private sector began. In 1987, the issue expanded to Naval aviation and Naval Air Systems Command (NAVAIR) when Congress mandated that the Naval Aviation Depots (NADEPs) would compete against private contractors for selected NAVAIR requirements.[Ref. 2:OMN] Since that time the concept of public/private competition for depot level maintenance has evolved into a hotly contested issue in the Department of Defense (DoD) and in private industry.

There has been strong emphasis throughout this process on establishing and maintaining a fair and level playing field with the private sector.[Ref. 3] In the post-award phase this has meant several changes from previous practice. From upgrading accounting systems to designating the source for Contract Administrative Services (CAS), the entire post-award phase had to be, and still is being reorganized.

One post-award issue that is currently the subject of

debate is how to process and decide disputes filed by a NADEP during the administration of an award which resulted from public/private competition. This thesis will address that issue. Keeping the level playing field in mind, the disputes process will be examined for both private firms and public activities. Then the disputes process for the NADEPs will be analyzed for effectiveness and possible improvement.

B. RESEARCH QUESTIONS

The following questions guided the research for this thesis:

1. Primary Research Question:

What are the key problems associated with resolving disputes between public buying organizations and public performing activities as a result of public/private competition and how can the process be improved?

2. Subsidiary Research Questions:

1. What is the current process of disputes resolution when Government agencies are both the performing and buying activities?

2. To what extent are disputes being resolved under the current process?

3. What are the problems associated with the current process?

4. What modifications can be made to enhance the process?

C. SCOPE

The scope of this thesis centers around Naval aviation depot level maintenance. It became apparent during the research that NADEPs that win an award as a result of public/private competition have administrative requirements which vary significantly from the requirements for private sector firms that win Government contracts. The disputes process for the NADEPs is one of the areas that is dissimilar and is where the research for this thesis was concentrated. The analysis is directed toward the disputes clause identified in NAVAIR Instruction 4200.35 and how well it accommodates public activities. The intention is that by examining the public and private disputes processes, a comparison can be made and the effectiveness of the public process can be identified. Further, a comparison of the processes will help determine if a fair and level playing field is being maintained. For the purpose of this thesis, public/private refers to public/private competition of depot level maintenance in support of NAVAIR assets.

It has become apparent that public/private is a dynamic program and is under constant scrutiny by Congress.[Ref. 4] Further, the regulations which guide NAVAIR's public/private policy are influenced by the rest of the Navy and the other Services. As a result, the laws and regulations affecting public/private are in a constant state of flux. This is a

fact of life in this program. To prevent this Thesis from falling into the same state of flux, only information available and current at the time of writing will be used. Proposed or anticipated laws and regulations will not be assumed as fact. Because public/private competition is a recent and ever-changing program, there is comparatively little documentation or readings on the subject. Therefore, this Thesis will concentrate on interviews as the primary source of data.

D. RESEARCH METHODOLOGY

There were two primary sources of information for this Thesis, interviews and historical files. The interviews were conducted in person and by telephone, depending on the availability of the source. Representatives from NAVAIR, the Naval Aviation Depot Operations Center (NADOC), NADEP Norfolk Va. and the Administrative Project Office, Norfolk Va. were interviewed in-depth to gain an understanding of the public disputes process and public/private in general. Other interviews were conducted to gain insight or to have specific questions answered which developed during the research. Historical files were made available for research by NADOC which contained past claims and appeals from the NADEPs to the Successor Procuring Contracting Officer (PCO) at NADOC. Also, contracting officers' final decisions, rationale for those decisions and opinions from the Office of General Counsel were

made available. Information concerning the private disputes process was readily available in the Federal Acquisition Regulation (FAR), the Defense FAR Supplement (DFARS), the Contract Disputes Act of 1978 and related documents.

E. ORGANIZATION

The basic organization of this Thesis will center around an examination of the disputes process in the public sector. Chapter II will provide the historical and chronological information required to understand the dynamics which drive NAVAIR's public/private policy. Chapter III will be an examination of the private sector disputes process and some strengths and weaknesses. Then Chapter IV will give the same examination of the public disputes process. Chapter V will analyze the public disputes process for effectiveness and provide conclusions and recommendations.

II. BACKGROUND

A. INTRODUCTION

This chapter will develop a historical background for public/private competition. First, it will identify the legislation which has affected public/private competition. Then it will look at NAVAIR's experience with public/private. In this section, NAVAIR's first and largest award will be examined for areas which affect the disputes process. Topics covered include fair and level playing field, contract administration services and cost and schedule control systems. The final section of this chapter will address NAVAIR's policy toward public/private and how it has changed over the years. The emphasis of this chapter will be on the post-award aspect of public/private as it relates to disputes.

B. LEGISLATIVE HISTORY

The authority to conduct public/private competition for depot maintenance evolved from a limited authority pertaining to public and private shipyards. Soon after, Naval Air Rework Facilities (now NADEPs) were added and eventually, all DOD depot maintenance activities. Several changes to the legislation have taken place as the program has evolved and a brief examination of these changes will provide a good chronological background.

1. FY 1985 Appropriations Act

In fiscal year (FY) 1985, Congress appropriated Operations and Maintenance, Navy (OMN) funds for a test program to compete two or more ship overhauls between public and private shipyards.[Ref. 1:Sect. OMN] The Secretary of the Navy was further directed to ensure that bids from the public shipyards and the private shipyards were comparable estimates of all direct and indirect costs.[Ref. 1:Sect. OMN] Congress acknowledged that the accounting and cost reporting systems at the NADEPs were not subject to the same requirements and oversight as the private sector. The intent of the comparability requirement was to ensure equity between the public and private bids.[Ref. 5] This requirement has continued with changes noted below, but industry complaints about this issue persist.

2. FY 1987 Appropriations Act

Congress continued the growth of public/private in FY 1987 by expanding its OMN appropriation to include "...the alteration, overhaul and repair of naval vessels and aircraft...."[Ref. 2:Sect. OMN] The inclusion of the NADEPs into public/private competition created problems not encountered at the shipyards. Unlike the shipyards, the NADEPs were competing for blocks of aircraft to be reworked or upgraded. There were multiple end items in varying condition, delivered at inconsistent intervals. Prior to public/private,

this was not a problem. The depots could be flexible about induction dates and the amount and scope of work to be accomplished. Under public/private, the Navy was "contracting" with either a private firm or a depot and the scope of work and schedule had to be clearly described in the specifications. These specifications had to take into account delays, work found "over and above" what was written and many other aspects.

3. FY 1990 Appropriations Act

Congress significantly changed the public/private competition legislation in the FY 1990 Appropriations Act by expanding authority to conduct public/private competition to all depot maintenance activities:

Notwithstanding any other provision of law, during the current fiscal year, the Secretary of Defense may acquire the depot maintenance and repair of aircraft, vehicles, vessels and components, through competition between Department of Defense depot maintenance activities and private firms The Secretary shall certify that successful bids include comparable estimates of all direct and indirect costs for both public and private bids. [Ref. 6:Sect. 9098]

In addition, a separate provision gave the NADEPs authority to perform manufacturing and compete for contracts for the production of Defense articles. [Ref. 6:Sect. 9096]

4. FY 1991 Appropriations Act

The FY 1991 Appropriations Act expanded the authorization to compete for production contracts to all of the depots [Ref. 7] and the FY 1991 Authorization Act included

a provision allowing the depots to compete for service contracts related to defense programs.[Ref. 8] In the report language of the FY 1991 Appropriations Act, the Senate Appropriations Committee expressed praise for the program:

The Committee continues to strongly support the Navy initiative to compete workload between public facilities and the private sector. Competition will continue to provide the most effective means of ensuring the lowest cost for goods and services. The Committee encourages the Department to consider a wider application of this initiative in the continuing defense management review.[Ref. 8:SAC. 101-521]

As the Army and Air Force enacted their public/private competitions they encountered the same basic problems that the Navy was already trying to deal with. Industry complaints about the depots having an unfair advantage were common.[Ref. 5] The depots were trying to learn how to act like a business, but decades as a Government activity could not be changed over night.

5. FY 1993 Appropriations Act

In response to industry complaints of an unfair advantage, Congress changed the wording in the FY 1993 Appropriations Act. It required the Department of Defense to award public/private contracts only if the Defense Contract Audit Agency (DCAA) had certified that successful bids had comparable estimates of all direct and indirect costs.[Ref. 9:Sect. 9095] A similar requirement was already in the Federal Acquisition Regulation (FAR) and applied to designated private firms doing business with DoD.[Ref. 10:Part 31.201]

The FAR did not apply to Government agencies, so Congress was helping to level the playing field.

Since the 1985 Appropriations Act, the Navy has been deeply involved in public/private competition.[Ref. 3] The legislative changes that have occurred since that time not only show Congress' approval of the program, but also its concern that the program provide the private sector with an equal opportunity to win public/private competitions.[Ref. 5]

C. NAVAIR EXPERIENCE

NAVAIR's first and largest public/private competition was for the Standard Depot Level Maintenance (SDLM) of selected F-14 aircraft in 1988. The competition was for a multi-year contract consisting of four F-14s in the first year and 20 per year over the next four years. Also, there was an option for up to five additional aircraft each year.[Ref. 11:Pg. 9] There were three proposals submitted: two from private contractors and one from a team of NADEP Norfolk, Va. and NADEP North Island, Ca. The NADEPs won the competition with a bid of \$124,453,366.[Ref. 12:Pg. 10]

This award has been the subject of three major audits since its beginning and these audits have strongly influenced NAVAIR's policy toward public/private. The three audits by the General Accounting Office (GAO), the Naval Audit Service (NAS) and auditors from the office of the Assistant Secretary of the Navy for Shipbuilding and Logistics (ASN S&L) (now ASN

RDA) acknowledged cost savings and efficiency increases at the NADEPs. They also identified several concerns with the program.[Ref. 11:Pg. 3]

Because of the extensive oversight and size of the F-14 award, it is an excellent source for examining NAVAIR's public/private experience. All of the concerns in the post-award phase affected disputes either directly or indirectly. The post-award audit concerns can be broken down into three areas: Fair and level playing field; Contract Administrative Services (CAS); and Cost and Schedule Control Systems (CSCS). CAS relates to the administration of a contract once it has been awarded and CSCS relates to the NADEP's ability to track and control costs. Each area will be examined in the following discussion.

1. Fair and Level Playing Field

Without question, the biggest problem that faced NAVAIR was the issue of a fair and level playing field between the public and private sector. This concept influences the entire spectrum of public/private competition. The question of how a DoD command can "contract" with a subordinate activity and have another subordinate activity provide oversight has serious conflict of interest overtones to the private sector and they cite many examples. The issue of cost comparability, discussed earlier, is one such example. It was not until the FY 1993 Appropriations Act that the NADEPs were

required to abide by the same auditing system as private firms and that came by congressional mandate, not from NAVAIR. [Ref. 13] The general concern was that NAVAIR and the NADEPs were not maintaining an arm's length relationship. [Ref. 13]

a. Chinese Wall

To address the conflict of interest problem, NAVAIR developed what they called the "Chinese wall". The idea was that there would be an imaginary wall between the people at NAVAIR and NADOC who represent the NADEPs and the people who compete and administer the contracts. On the surface the concept was a good one, but it turned out often that people working in the same office were on the opposite sides of the wall and communication problems were common. [Ref. 14] This, combined with the usual communication problems in a large organization like NAVAIR, has made changes very slow. Over time changes have been made at NAVAIR which have improved the Chinese wall concept and a significant number of the potential conflict of interest situations have been eliminated.

However, Policy officials at NAVAIR concede that the appearance of conflict of interest still exists in places, but that is just the nature of the program and they cannot remove all of it. [Ref. 14] Industry officials have also acknowledged that it is not perfect, but the Navy's program is far more fair than it was and is better than the Air Force program. [Ref. 15]

b. Advantages

There are other issues related to the question of a level playing field than just conflict of interest. There are aspects of the program which work in the favor of public activities and others that work in favor of private industry. Public activities may have lower overhead rates regardless of comparability analysis. They have ready access to Government property and technical libraries. And they may enjoy a less than arm's length relationship with NAVAIR.

However, it is not a one sided advantage. Public activities are not provided an opportunity to protest solicitations and as a Government Agency, their disputes process is solely administrative. They have no legal recourse.[Ref. 16] Further, they are subject to unilateral changes without consideration in return. The Federal Acquisition Regulation (FAR) requires consideration to private firms for all changes.[Ref. 10:Part 43.204] And perhaps most important, the NADEPs have almost no data rights. This means that competitors have access to all of their processes through the Freedom of Information Act (FOIA) and NAVAIR's legal counsel is concerned that, if challenged, the courts might find that their proposals are "Government documents" and also available through FOIA.[Ref. 16] It is clear that the issue of a fair and level playing field is not going to be resolved

in the near future and policy officials at NAVAIR are concerned that it will lead to more problems.[Ref. 16]

2. Contract Administrative Services

The requirement for post-award administration and "contract" oversight was a new concept for the NADEPs. Why would they need to duplicate existing financial control, quality assurance and material control systems? The NADEPs were Navy facilities that already had internal review functions and compliance techniques in place. As a result, the CAS provided to the NADEPs in the beginning was confused at best.[Ref. 17] NAVAIR, NADOC and the NADEPs had to learn as they went. As they would soon find out, their existing controls did not require the depth of preparation and oversight required in the private sector by the FAR. The NAS Audit described the NADEPs new relationship as they saw it:

When a Navy activity has successfully competed against a commercial firm for a contract award, that Navy activity essentially becomes a "pseudo-contractor". The role of the "contractor" carries with it the requirement for post-award administration and oversight to assure that "a level playing field" is maintained, i.e., the Navy "contractor" is subject to essentially the same ground rules and is treated in essentially the same manner as a commercial contractor.[Ref. 12:Pg. 7]

NAVAIR quickly adopted this concept and all changes in the program have this basic concept in mind. With this concept as a base, NAVAIR had to address the individual CAS issues that needed improvement.

The first area to be discussed was what activity would be tasked to provide CAS for the NADEPs. In December 1990, NAVAIR Instruction 4200.35 was issued. This was the first comprehensive written direction given in public/private.[Ref. 18] It provided for Administrative Project Offices headed by Administrative Project Officers (APOs) to accomplish the bulk of the contract administration work. Their responsibilities included:

1. Evaluate, negotiate and authorize new work.
2. Maintain records and conduct status reporting.
3. Audit material and parts control for over and above work.[Ref. 19]

NADOC was assigned successor PCO responsibilities, but the APOs were placed under the program managers at NAVAIR, not NADOC.[Ref. 20:Pg. 6] The program managers were not equipped to provide guidance in contract administration and the APOs were eventually placed under NADOC for support.[Ref. 21] Citing lack of training, lack of support and insufficient manning, each audit was critical of the APO process.[Refs. 22,11,12] It was clear that the CAS for public/private had to be improved.

Two options for a CAS activity were examined. The first was to task NADOC with the requirement. This would provide NAVAIR with the in-house capability to administer its public/private awards, but NADOC's contracting directorate was

small. Significant personnel and funding increases would be required to accomplish the added responsibility.[Ref. 17]

The other option was to request CAS support from the Defense Contract Management Command (DCMC). DCMC administers DOD private contracts and is staffed to administer added awards if needed. The major problem was that DCMC did not provide oversight of other Government activities.[Ref. 23] The Government had its own regulations and internal oversight. Therefore, DCMC initially did not want to get involved.

Public/private was an entirely new issue and required a rethinking of DCMC's charter if they were to administer the awards. If the NADEPS were to act as "pseudo contractors", it seemed appropriate to NAVAIR that DCMC should provide CAS support for public/private awards.[Ref 23] Further, since DCMC already administered private awards, it would help to level the playing field. After lengthy discussion between NAVAIR and DCMC and an official support request from NAVAIR, DCMC decided to accept CAS responsibility for NAVAIR public/private awards.[Ref. 23] The existing APO structure will complete administration of the outstanding awards and DCMC will administer all new contracts.

Whether this move will be effective in providing quality CAS support to the NADEP contracts remains to be seen, because NAVAIR has not awarded any public/private contracts since the decision. It is clear; however, that DCMC will be

able to bring the appropriate, qualified personnel in to administer these contracts.

The next CAS issue that NAVAIR had to address was what form the CAS document, or "contract" would take. The NADEPs were to be treated in the same manner, with the same ground rules as commercial contractors. Therefore, their awards were to be written and administered just like a contract. This view was shared by NAVAIR, NADOC and the APOs, but the NADEPs took a different interpretation. They felt that once they had won the award, it was business as usual.[Ref. 24] Prior to public/private competition, Navy depot maintenance on each type aircraft was performed by one or more of six NADEPs. The depots were automatically assigned workload by NAVAIR and their work was completed according to a project order, which was administered within the NADEP with assistance from NADOC. The depots were paid a pre-budgeted price for each job based on labor rates and past experience.[Ref. 11:Pg. 2] There was no need for extra paperwork, because they viewed the way they had always done business as being effective.[Ref. 16]

The problem was exacerbated by the fact that there was no contract to administer. A project order was issued for the F-14 SDLM just as it had been before public/private and the APOs were expected to administer it like a contract.[Ref. 11:Pg. 21] A project order is really nothing more than a funding document. This project order contained a few clauses

found in a standard contract, but, for the most part looked to the NADEPs like business as usual.

The NADEPs argued that they should be paid the total amount authorized in the project order regardless of the amount approved by the APO. Viewing the contract as just another project order, they showed little concern if costs exceeded the amounts authorized by the APO.[Ref. 11:Pg. 22] Even though NAVAIR wanted the award administered like a contract, the NADEP bills were paid in full as long as costs did not exceed the amount in the project order.[Ref. 11:Pg. 22]

Differing opinions and confusion continued until NAVAIR Instruction 4200.35 was issued. As stated earlier, it was the first definitive instruction for public/private and it ended the debate for good:

As the government does not contract with itself, should a competitive workload be won by a public activity, NAVAIR will issue a work assignment document to that activity. The work assignment document will include the same statement of work, price structure, and schedule as the competed solicitation as well as procedures which are applicable to a public activity. Although the work assignment document will not be subject to the provisions, terms and condition of the federal acquisition regulations, it will be administered following the terms and conditions within the document as if it were, in fact, a contract.... While the document is not actually a contract, it is an agreement between NAVAIR/PEO and a public activity.

a. The public activity agrees to:

- (1)perform to a specified statement of work;
- (2)deliver the product following with the delivery schedule;

(3)complete the work at the price/cost bid in their proposal; and

(4)perform the work following the specified requirements

b. NAVAIR/PEO agrees to fund the approved work performed.[Ref. 20:Encl. 1]

The work assignment document (WAD) is the public/private version of a contract. It has evolved since the issuance of NAVAIR Instruction 4200.35 to the point that it looks much like a private contract. Though the FAR does not apply to the WAD, administration can be performed as though it did apply and a fair and level playing field can be maintained.

3. Cost and Schedule Control Systems

The final area of audit concerns affecting disputes is the cost and schedule control systems used by the NADEPs. Their ability to account for work accomplished on specific aircraft and the tracking of material costs per aircraft was of specific concern.[Ref. 12:Pg. 1] Also, material purchasing and handling was addressed. The discussion of cost and schedule control will involve two areas: cost accounting procedures and material purchasing.

a. Cost accounting

As discussed earlier, before public/private, the NADEPs were paid a pre-budgeted price for their assigned work orders. Under public/private, justification of costs was required, down to costs assigned to individual aircraft. This

was required not just for the fair and level playing field aspect, but also for negotiating over and above costs and for providing accurate cost information in future proposals.[Ref. 11:Pg. 2]

The NADEPs use the NAVAIR Industrial Financial Management System (NIFMS) for all of their cost accounting. The system was designed to provide tracking of project orders at the NADEPS, but it did not track costs to the degree required for public/private competition. Specifically, it could not assign material costs to a job on a specific aircraft. Nor could it track individual over and above costs on each aircraft.[Ref. 24] This made it very difficult for the NADEPs to justify costs and claims for over and aboves.

NADOC, which is responsible for the design and maintenance of NIFMS, provided a variety of upgrades to the system and in 1991 felt that they had made necessary upgrades.[Ref. 17] The Naval Audit Service Report questioned the capabilities of the upgraded NIFMS in the public/private arena.[Ref. 12:Pg. 18] NAVAIR responded that NIFMS was not subject to FAR requirements as a cost accounting system and that it had been certified for Government use by the Comptroller of the Navy.[Ref. 12:Pg. 18] To ensure that the upgraded NIFMS was sufficient for public/private use, NADOC requested a DCAA audit of the system. DCAA found that the system design met all FAR requirements for a cost accounting system.[Ref. 18]

Although the system design was sufficient, there have been significant installation problems. Currently, the upgraded NIFMS is not fully on line at any of the NADEPs. [Ref. 25] To compensate for NIFMS' shortcomings, the NADEPs attempted to develop supplemental accounting systems to provide justification of costs. Each depot operated independently of the others, so individual systems were developed. Compatibility, consistency and accuracy problems exist as this problem remains unresolved. [Ref. 25]

As pointed out earlier, the NADEPs spent decades under the project order system. The artisans that worked at the NADEPs were not trained to document work over and above the specifications, nor did they closely track parts usage. Their concern was with the finished product as long as it was within the project order price. [Ref. 4] Accounting for material usage and tracking costs was foreign to them. They were further confused by the fact that some aircraft were competed and some were not. The competed aircraft required tracking and documentation, while the assigned (or non-competed) aircraft did not. This required extensive training and a change in attitude. The effectiveness of this training will be discussed in later chapters.

b. Material purchasing

Being a part of the Navy, the NADEPs operate under the Navy supply system. The Aviation Supply Office (ASO)

operates the aviation side of the Navy supply system. This creates two problems in the public/private arena. The NADEPS must operate under the Navy supply system and private firms normally do not have access to that system. Both sides see this as a disadvantage.

The NADEPS normally cannot go to the open market for parts. They must abide by the price and availability of the supply system. Their only option is to request an "open purchase" through the Navy Supply Center if parts are not readily available in the supply system, and this process can be very time consuming. The problem is exacerbated by the fact that ASO utilizes a priority system for its customers. Unfortunately for the NADEPS, they are at the bottom of the list.[Ref. 16] When it comes to obtaining scarce parts, the NADEPS are almost assured of long delays.

Private firms, on the other hand, did not have access to the Navy's vast supply network designed to acquire spare aviation components. They would not be buying parts in the same volume that ASO did, so they would not get the same volume discounts. Further, they would have to buy parts after the award which can create a long lead time, while the NADEPS have parts readily available in their system. This disparity has been addressed in current WADs. Should a private firm win a public/private award, they will be granted access to the Navy supply system for parts directly associated with the award. However, the NADEPS are granted deviation from the

supply system only in the event of excessive delays.[Ref. 31]
They cannot seek better prices or quicker delivery by sub-contracting with the private sector.

NAVAIR, NADOC and the NADEPs have worked aggressively to solve the problems in CAS, CSCS and level playing field with some successes. The F-14 SDLM award has proven very useful as a testbed for NAVAIR's public/private experience to date and that experience has helped to shape NAVAIR's policy toward public/private.[Ref. 14]

D. NAVAIR PUBLIC/PRIVATE POLICY

1. Initial Policy

In 1986, representatives of NAVAIR and the NADEPs met to develop a policy on public/private competition. They enthusiastically endorsed competition and even made plans to compete for business currently held by the private sector. Their attitude was not to protect the current base, but expansion:

There are benefits to be realized through competing with the private sector. Workload previously considered the sole province of prime contractors is now open to competition. Any additional workload gained through competition will enhance our technology base and price competitiveness. By the same token, competition involves risk. Therefore we must plan to win and organize to do so.[Ref. 26:Pg. 3]

a. Strategy

The initial strategy for competition was given as follows:

- a. Focus on near-term competitions that reflect immediate cost savings to the Navy.
- b. Organize to meet short-term competition without jeopardizing the long-term health of the organization.
- c. Develop a competitive cost structure comparable to private industry.
- d. Prepare a corporate proposal that reflects our most competitive position.
- e. Establish audit controls for execution of contracts which meet requirements of DODINST 7002 that include financial, labor, material and progress reporting.
- f. Plan to win, but develop contingency plans that will minimize the impact of losing. [Ref. 26:Pg. 3]

During the research, it became clear that NAVAIR's aggressive attitude toward public/private was overenthusiastic. Naval Sea Systems Command (NAVSEA) reported cost savings and efficiency increases without great upheaval and NAVAIR expected the same. They originally identified about \$ 2.2 billion in annual funding that was eligible for competition and 15 programs were targeted over the successive five years. [Ref. 12:Pg. 1] They soon discovered that public/private competition was not as easy as they thought. Lacking sufficient personnel, organic capability and technical data, they discovered that turning NADEP specifications into a competitive request for proposal was an enormous task. Delays in funding approval created further difficulties. As a result of these difficulties, NAVAIR only competed four programs from 1988 through 1990, for a total of \$211 million. [Ref. 12:Pg. 1]

NAVAIR's initial difficulties, combined with the problems identified in the audit reports, were making

public/private a real headache for NAVAIR, but these were not the only forces affecting their policy. Laws, regulations and influence from other Services helped to shape this policy. Probably the most influential factor, however, has been economics. In 1986, the Navy was looking forward to a 600 ship fleet and NAVAIR was accustomed to an expanding budget. It is logical to assume that this idea of expansion would carry over into NAVAIR's public/private policy. The Navy was expanding, so the Navy's depot capabilities should expand along with it. Seven years later, with a dramatically declining defense budget, the Navy is cutting back on everything while trying to maintain basic capabilities. It follows that this must also have a logical influence on NAVAIR's current policy.

2. Current Navy Policy

Having looked briefly at the Navy's experiences with public/private competition, an examination of the current competition policy is appropriate. The exuberance about public/private competition seen in the initial strategy has changed over the years as NAVAIR has worked to make it a viable way to save money for the Navy.[Ref. 14] There is no longer any interest in taking work away from private industry. In fact, there is a striking change:

The Navy's strategy in the downsizing environment is to maintain only a minimum level of organic capacity, consistent with future force levels, that is necessary to sustain peacetime readiness and war fighting surge capability. The Navy will work in partnership with the commercial aerospace industry and the commercial ship building industry to make

maximum use of their production capabilities and capacity. The strategy will enable the Navy to help preserve the private sector industrial base without compromising its responsibility to maintain ready and responsive organic capability. [Ref. 27:Pg. 2]

a. Strategy

Specifically the Navy's strategy is to:

1. Define minimum core requirements (capabilities, capacity and workload) necessary to maintain fleet readiness through the life cycle. This core work will not be offered to industry.
2. Close excess depots as expeditiously as possible, consistent with BRAC guidelines.
3. Rightsize remaining depots to perform core work. Investment strategies for military construction, base improvements, and equipment will support core work and will not duplicate capabilities and capacity available in the private sector.
4. Offer non-core to industry for competition. Navy depots will not compete against private industry, unless there are insufficient commercial competitors.
5. Develop commercial contract guidelines that specify readiness requirements.
6. Develop a long-range plan which identifies Navy core work, and work that will be available for industry, allowing both government and industry to make long-term strategic decisions.
7. Transition to this industrial strategy concurrent with execution of base closure and realignment decisions. [Ref. 27:Pg. 3]

NAVAIR's shift from expansionism to protectionism is very apparent when the two public/private policies are compared. The factors discussed above have driven this policy to the point that NAVAIR wants to use this program only to prevent a sole source situation on work competed above the core. This dramatic policy

shift will most certainly reduce the public/private awards to be administered and, consequently, the need for disputes resolution.

E. SUMMARY

This chapter has provided the historical background necessary to understand the public/private disputes process. By examining the legislative history, the NAVAIR experience and NAVAIR's public/private policies, the background is now available to understand the influences on the process.

III. PRIVATE DISPUTES

A. INTRODUCTION

This chapter will address the disputes process as it applies to the private sector. The Contract Disputes Act of 1978 created the current process and this chapter will examine its incorporation into the FAR. Also, key detractors from the process will be identified. The FAR also recommends Alternate Disputes Resolution (ADR) as an option to the legal process delineated by the Contract Disputes Act of 1978. [Ref. 10:Part 33.214] The ADR concept will be discussed along with the primary types of ADR to ensure clear understanding for possible application in later chapters.

B. CONTRACT DISPUTES ACT OF 1978

In 1978, Congress passed the Contract Disputes Act which outlined contractor and contracting officer responsibilities, as well as establishing the agency boards of contract appeals. It further outlined the judicial review process of board decisions. [Ref. 28:Pg. 667] One of the provisions contained in the Contract Disputes Act of 1978 was for contractors to make claims directly to the contracting officer. They could appeal unfavorable decisions to either the General Services Board of Contract Appeals (GSBCA) or the Armed Services Board of Contract Appeals (ASBCA), or they could bring an appeal

directly to the United States Claims Court.[Ref. 28:Pg. 667] If the contractor disagreed with the ASBCA or GSBICA decision, they could appeal to the United States Court of Appeals. Once inside the U.S. Court system, decisions of lower courts could be appealed to higher courts, including the United States Supreme Court if warranted. This ensured that justice would be served to the maximum extent possible.

1. Drawbacks

When the FAR was published in 1984, the Contract Disputes Act of 1978 was fully incorporated.[Ref. 10:Part 33.202] The process described above has become the standard for disputes resolution in the private arena. Unfortunately, by its nature, this process has one major drawback. Anyone who has had experience with the court system knows that it is a very long and potentially expensive process. This can, understandably, result in contractors being reluctant to appeal a dispute to the U.S. Courts.

Even appealing a dispute through the agency boards can be very time consuming.[Ref. 29:Pg. 17] The following time factors resulting from the Contract Disputes Act of 1978 can add up very quickly: 1. The contracting officer has up to 60 days to decide a claim by the contractor. 2. The contractor has up to 90 days to appeal that decision to the ASBCA or the GSBICA. 3. If the amount in dispute is less than \$50,000, the contractor can elect to utilize the "accelerated" method,

according to which the board has 180 days to reach a decision.
4. The average case now in the ASBCA lasts from two to four years or longer.[Ref. 29:Pg. 151]

A brief examination shows that the process established by the Contract Disputes Act of 1978 may indeed be fair, but it is also quite long. The system has also been subject to other criticisms. One such complaint is that the decision authority may be given to contracting officers, administrative judges, or even court judges with no substantial expertise in the area of the dispute. Another allegation is that the legal system promotes adversarial relationships between the parties involved.[Ref. 29:Pg. 39]

C. ADMINISTRATIVE DISPUTE RESOLUTION ACT

These problems were identified by Congress when it passed the Administrative Dispute Resolution Act (P.L. 101.552). It acknowledged that "...proceedings have become increasingly formal, costly and lengthy..." and that "... alternative means can lead to more creative, efficient and sensible outcomes...."[Ref. 28:Pg. 477] As a result of this act, the FAR was amended with a new policy statement promoting ADR:

The Government's policy is to try and resolve all contractual issues in controversy by mutual agreement at the contracting officer's level. Agencies are encouraged to use alternative disputes resolution (ADR) procedures to the maximum extent practicable in accordance with the authority and requirements of the Administrative Dispute Resolution Act (Pub.L. 101.552) and agency policies.[Ref. 10:Part 33.204]

It would seem that the intent is to elevate ADR to the primary process for disputes resolution. Given the emphasis on ADR in the FAR, a base knowledge of ADR is required for future application.

D. ALTERNATIVE DISPUTES RESOLUTION

Alternative disputes resolution is defined in the Administrative Dispute Resolution Act as "any procedure used in lieu of adjudication".[Ref. 29:Pg. 478] This broad definition opens up numerous opportunities. The form that ADR takes is entirely up to the parties involved. ADR has taken some basic, accepted forms over the years and can be broken down into primary and hybrid forms.

1. Primary Forms

The primary forms include arbitration, mediation and negotiation.[Ref. 29:Pg. 69]

a. Arbitration

Arbitration can generally be defined as a process where disputants refer the issue to an impartial third party, selected by them, to give a decision based on the evidence and arguments to be presented. The parties agree in advance that the arbitrator's decision will be final and binding.[Ref. 29:Pg. 44]

Some advantages of arbitration are: 1. It is a much faster process than litigation. 2. It is less complicated than litigation. 3. It is generally less expensive than

litigation. 4. The parties involved have control over who will decide the dispute.[Ref. 29:Pg. 69]

Some of the disadvantages of arbitration are: 1. Arbitration is still adversarial in nature, with a win/lose outcome. 2. Arbitrators are not bound by any previous decisions; therefore, outcomes are difficult to predict. 3. Agreement on a qualified third person can be difficult.[Ref. 29:Pg. 380]

b. Mediation

Mediation can be defined as a process by which an impartial mediator guides the disputants to a negotiated settlement. The mediator employs a variety of skills to promote communication and eventual agreement, but has no decision making authority.[Ref. 29:Pg. 45]

The advantages that apply to arbitration also apply to mediation in that it is faster, cheaper and less expensive than litigation. Further, it is non-adversarial and the goal is a win/win agreement. Additionally, mediation provides the flexibility for disputants to address a wide range of complex issues in creating an overall agreement.[Ref. 29:Pg. 219] The key disadvantages to mediation are that disputants often have taken positions based on principles that are beyond negotiation. The issue in dispute may also require a determination of direct responsibility. Parties in mediation

have a difficult time deciding responsibility between themselves.[Ref. 29:Pg. 222]

c. Negotiation

Negotiation is generally considered to be relatively informal communication between parties in an effort to reach an agreement on a specific issue.[Ref. 29:Pg. 415] Negotiation can span from informal phone conversations between decision makers to high priced negotiators matching their skills in a labor dispute. Since negotiation can take so many forms, there are no established rules; however, certain fundamentals apply. These include a thorough knowledge of the facts, proper planning and active listening.[Ref. 29:Pg. 418]

The key advantages identified for arbitration and mediation, specifically, lower cost, less time and less complication, apply to negotiation also. Further, the parties involved have complete control over the agenda and the process. It is a non-adversarial process intended to maintain strong long term relationships between the parties involved.[Ref. 29:Pg. 429]

Negotiations also have some inherent disadvantages. First of all, both parties must be willing to negotiate. Further, there is no guarantee that an agreement will be reached, or that both parties will abide by that agreement. An additional problem is that sometimes the abilities of the negotiator become more important than the facts at hand.

2. Hybrid Forms

As it would seem, there are numerous forms of hybrid ADR. Some of the current popular hybrids are private judging, expert fact finding, mini-trials and summary jury trials. [Ref. 29:Pg. 70] The idea behind hybrid forms of ADR is that an existing form can be tailored to suit a specific situation to provide maximum advantages and minimum disadvantages to the parties involved. Two current forms of ADR have generic application to public/private, so a brief examination may be useful. These forms are called Med-Arb and Administrative Arbitration.

a. Med-Arb

Med-Arb is a hybrid of mediation and arbitration in which the "med-arbiter" is authorized by both parties to serve first as a mediator and then as an arbitrator empowered to decide any issues not resolved through mediation. [Ref. 29:Pg. 45] The intent of med-arb is that through mediation, the adversarial impact of arbitration is reduced which promotes stronger relations between the parties involved. The mediation will improve communication, allowing some disputes to be resolved without the need for arbitration. This improved communication can also help prevent disputes in the future. The arbitration portion can then be used when the parties cannot come to a mediated agreement.

b. Administrative Arbitration

Administrative arbitration is a variation on arbitration in which the arbitrator is either chosen by the Government Agency involved in the dispute or the arbitrator is chosen from within the Government Agency by the disputants.[Ref. 29:Pg. 337] The idea is that within the Agency involved in the dispute is a person with sufficient expertise and availability to sit as the arbitrator and that as a Government employee their services could be obtained at a very reasonable price, often at no charge.[Ref. 1:Pg. 317] The obvious drawback is that there is a potential that this person could be biased toward the Agency and a fair result may not be possible. The application becomes a little more beneficial when responsibility is not in question, but only a determination of value. Also, since most Government agencies are very large, an employee with no vested interest in the dispute is potentially available.

E. SUMMARY

This chapter has examined the private disputes process from the Contract Disputes Act of 1978 to FAR passages in determining the current path a dispute takes to its conclusion. During this path, litigation becomes a major cost and time influence. As an alternative to litigation, this chapter introduced alternative dispute resolution in some of its key forms. It should be noted here that if public/private

competition is going to maintain a fair and level playing field, the public disputes process must fit within the framework described in this chapter.

IV. PUBLIC DISPUTES

A. INTRODUCTION

This chapter will examine the disputes process as it relates to the public arena. Though much has been proposed, there is little written direction concerning the public aspect of the disputes process. [Ref. 14] The central directive for NAVAIR's disputes process is NAVAIR Instruction 4200.35. The following discussion will concentrate on this instruction. Difficulties with this process will be examined, as well as changes to the WADs that DCMC administers. Keeping in mind that this is an ever-changing process, only NAVAIR Instruction 4200.35 and actual language in current WADs will be considered legitimate requirements for the NADEPs.

B. APPLICATION

Since the Government cannot contract with itself, the volumes of FAR and DFARS guidance do not apply to the NADEPs. However, as discussed earlier, it is NAVAIR's policy that the WAD contain all of the standard terms and clauses required by the FAR. This provides for interpretation and administration consistency in the post-award area.

In application to disputes, however, this concept can only go so far. The Government cannot sue itself. Therefore, the legal aspect of the disputes process simply does not apply to

Government agencies and their subordinate activities. The apparent result is that the public disputes process cannot parallel the requirements set forth in the FAR and a fair and level playing field cannot be maintained. However, just because the public disputes process cannot parallel the legal process set forth in the FAR, does not mean that it cannot comply with the intent of the FAR. Therefore, it stands to reason that a viable public disputes process should incorporate the portions of the FAR that can be applied.

C. PROCESS

The GAO review and the ASN (S&L) audit examined NAVAIR's disputes process for the F-14 award and both were critical of the process.[Ref. 14] Lacking a clear procedure for disputes resolution,[Ref. 22:Pg. 7] NAVAIR was expected to take the ASN (S&L) recommendation for action:

NAVAIR: Establish an independent arbitration board at the NAVAIR HQ level to resolve disagreements/disputes in such areas as technical requirements, interpretation of project order terms and conditions, etc. (...).[Ref. 22:Pg. 6]

1. NAVAIR Instruction. 4200.35

The resulting directive created a chain that goes from the NADEPs to the WAD administering agent (APO). If the NADEP disagreed with the APO decision, they could appeal to the PCO (NADOC). If they disagreed with NADOC, they could appeal to NAVAIR (AIR-02) and again to COMNAVAIR if necessary.[Ref. 20:Encl. 1] It is expected that AIR-02 will be the final

authority on all but the most contentious issues. Essentially all that NAVAIR has done is take the NADEP's chain of command and make it their disputes process. It might seem that the NADEPs would have trouble with this process because there is no opportunity to appeal outside their chain of command, let alone any kind of board, such as the Armed Services Board of Contract Appeals (ASBCA). And from a level playing field aspect, this does not parallel the legal process described in the preceding chapter.

Interestingly, as NAVAIR has applied this process, only two real problems have emerged: a. level playing field. and b. training.[Ref. 25]

a. Level playing field

As discussed earlier, the fair and level playing field applies to all aspects of public/private. Given the congressional awareness of public/private, it is highly probable that the GAO will review NAVAIR's public/private again. NAVAIR must make every effort to level the playing field in all aspects of public/private or face another disturbing review by the GAO. By not paralleling the FAR, their disputes policy in NAVAIR Instruction 4200.35 does not help that cause.[Ref. 30]

b. Training

The second problem relates back to the training of the APOs and the NADEP personnel. The APOs were singled out

by the NAS audit as being poorly trained to administer NADEP awards.[Ref. 12:Pg. 20] NAVAIR and NADOC have worked with the APOs, gaining excellent results.[Ref. 21] Training and staffing at the APO level is now at appropriate levels.[Ref. 21]

Training at the NADEPs, unfortunately has not achieved the same results.[Ref. 25] As identified earlier, the artisans that work on the aircraft had to be trained to document "over and above" actions down to specific aircraft and work breakdown structure. This has been slow in coming. NADEP documentation is the primary source of disputes that are appealed beyond the APO level.[Ref. 14] The primary cause of these disputes is the failure on the part of the NADEPs to provide substantiating documentation to back up their claims.[Ref. 14] The NADEPs have a mindset of getting the job done, paperwork or not. That mindset may work fine for non-competed aircraft, but NAVAIR Instruction 4200.35 directs that competed aircraft must be handled according to WAD requirements.[Ref. 20:Pg. 3]

c. Results

Interestingly, the NADEPs indicate that they have no major complaints about NAVAIR's disputes process.[Ref. 16] It is seen as fair, because AIR-02 and COMNAVAIR are in the chain of command for both the NADEPs and the APOs.[Ref. 16] The NADEPs see AIR-02 and COMNAVAIR as unbiased arbiters. The

APOs have expressed no major complaints about the system either.[Ref. 24] They add that the NADEPs are improving their documentation of "over and above" work.[Ref. 24] This, combined with a cost and schedule control system that can adequately account for the NADEP's work is expected to reduce disputes to a very small number. Both the NADEPs and the APOs see the F-14 award as a learning experience and are relatively happy with the results.[Refs. 4,24] They simply would like to have seen the process mature faster than in the past.[Refs. 4,24]

The NADEPs and the APOs are key players in the disputes process. They do not have any real problems with it as addressed by NAVAIR Instruction 4200.35. However, the process must stand up to the level playing field question and the entrance of other Government agencies.

2. DCMC Addition

The addition of DCMC into the public/private arena is creating new issues that NAVAIR must address.[Ref. 14] There are now two Government Agencies involved in the disputes process. As with any two Government Agencies working together there may be differences in priorities and potential power struggles.

a. Power struggle

NAVAIR sees DCMC as filling the role of the APO.[Ref. 14] DCMC is accustomed to having most PCO

responsibilities delegated to them and making contracting officers' final decisions on administrative matters. They do not like the idea of the successor PCO at NADOC having the authority to overturn the decision of a DCMC contracting officer who is the ACO.[Ref. 30] Further, DCMC feels that more must be done to level the playing field. They do not want the GAO to audit public/private and implicate DCMC with unfair practices.[Ref. 30]

b. Results

Several meetings between NAVAIR and DCMC have resulted in only minor changes to NAVAIR's disputes process.[Ref. 30] The provisions in the two most recent WADs describe a process very similar to the one in the NAVAIR Instruction. The NADEPs are to make claims to the Administrative Contracting Officer (DCMC ACO). If they disagree with the ACO, they are to appeal to the NAVAIR PCO (NADOC). If they still disagree, they are to appeal to AIR-02, who will be the final authority.[Ref. 31:Sect. G] This is the current disputes process according to NAVAIR.[Ref. 14]

However, it is unclear how long this policy will last. Policy officials at NAVAIR and DCMC agree that this is not yet a finished product.[Refs. 14,30] It is just an attempt to improve the process for the two recent awards. The veto question still exists along with the level playing field question.

3. Public/public competition

External factors are also affecting NAVAIR's disputes process. The most current is the participation of other public activities in competition. This is referred to as public/public competition. The intricacies of public/public competition are beyond the scope of this thesis. However, the influence of public/public on public/private warrants discussion.

Since the 1990 Appropriations Act, all DoD depots have been authorized to compete with private industry for selected work.[Ref. 6] A recent hybrid of this authorization is depots competing against each other, or competing against each other and private firms. Under this competition, NAVAIR could make an award to an Air Force depot. That depot would perform the work while DCMC administered the WAD. In the event of a dispute, the depot can only appeal back to NAVAIR, who originally competed the work. This puts a new twist on the level playing field aspect, but the implications are clear. The Air Force depot may not view Air-02 as an unbiased arbitrator. After all, it is NAVAIR's money that is being spent.

Another influence that arises from public/public competition is similar to that discussed when DCMC became involved in public/private competition. If a depot from another Service wins a NAVAIR competition, there would then be

three Government agencies involved and the problems of priorities and power struggles could begin again.

The additional requirements of public/public competition creates even more demands on NAVAIR's disputes process. That process must accommodate the addition of DCMC and the influence of public/public competition. Further, if it is to be truly equitable, it must also parallel the FAR. This is becoming a very difficult task, but one that is not out of reach.

D. SUMMARY

In this chapter, the disputes process has been examined as it relates to NAVAIR. It has shown that NAVAIR is under pressure to revise its process. Internal factors such as the level playing field and external factors such as public/public competition are forcing NAVAIR to rethink its process. If NAVAIR is going to develop a disputes process which fulfills all of the requirements placed on it, they must go back to the FAR. If they can comply with FAR requirements, then they will have the base for an effective disputes process that is not so easily open for interpretation. Even though the FAR does not apply, simply complying with it anyway will give the process credibility when other agencies become involved.

V. CONCLUSIONS AND RECOMMENDATIONS

A. INTRODUCTION

This chapter will examine the public disputes process for effectiveness. Understanding that to maintain a fair and level playing field, the public disputes process should parallel the FAR, this chapter will show where the FAR can apply. ADR principles will also be applied to minimize any inconsistencies. Also, the primary and secondary research questions will be reviewed to ensure that they have been adequately answered. The end result will show a clear path for recommendations given at the end of this chapter.

B. FAR APPLICATION

It has been shown that NAVAIR's disputes process does not parallel the standard litigation disputes process identified in the FAR.[Ref. 10:Part 33.202] It has also been shown that NAVAIR's process should comply with the intent of the FAR in order to maintain a fair and level playing field. Noting the previous points, it is evident to the researcher that NAVAIR's disputes process should encompass ADR as outlined in the FAR. The current process already fits within the broad definition identified in Chapter III, so only changes made to address effectiveness and level playing field should be required.

Interestingly, NAVAIR does not acknowledge their process as a potential form of ADR, or that this process might, in fact comply with the FAR. When asked about ADR, one NAVAIR official stated that NAVAIR (collectively) does not know enough about ADR to apply it successfully.[Ref. 14] It would seem that learning more about applying ADR would be much simpler than responding to criticism about the fairness of their process.

C. EFFECTIVENESS

Having identified the public disputes process in Chapter IV, it is incumbent to analyze the process for effectiveness. The key to any effective dispute process is that it resolves disputes in a manner which is agreeable to the parties involved. As discussed earlier, the NADEPs and the APOs agree that NAVAIR's process is fair and unbiased, because AIR-02 is in both of their chains of command. Also, the researcher has found that AIR-02 has no vested interest in who "wins" these disputes. The motivation, it seems, is to resolve the issues in a timely manner, so funding issues can be cleared up and some form of precedence is given for future issues. There was a genuine concern both at NADOC and AIR-02 that a dispute be resolved as fairly and as quickly as possible, so that the APO and the NADEP would have clear direction if a similar issue developed in the future.

1. Current Policy

The push by AIR-02 and NADOC for timely decisions warrants further examination. To date there have been only six disputes appealed to AIR-02.[Ref. 14] All others were resolved at the APO or NADOC level. The length of time from a NADEP appeal to NADOC to the final decision by AIR-02 ranged from approximately six to nine months. When compared to the time frames discussed in Chapter III, this is excellent response time. Further research indicates that response times would have been faster if not for an added step by NADOC. When the successor PCO gave a decision on an appeal, it was always routed through NADOC's legal counsel for accuracy of supporting documentation and identification of potential weak points from a legal standpoint.

Based on the information available, it has become clear to the researcher that NAVAIR's current disputes resolution process is a viable and effective form of disputes resolution. However, as identified earlier, it must be flexible enough to be effective when DCMC and/or another Service's depot are involved.

2. DCMC

As discussed earlier, DCMC is concerned that NADOC's PCO will have the power to overturn the decision of one of its ACOs. The researcher can find no foundation for this concern. There is no reason whatsoever to question the decision-making

ability of NADOC's PCOs, or DCMC's ACOs. Further, it is the PCO's prerogative to maintain or delegate his authority to render the contracting officer's final decision.[Ref. 10:Part 42.202] That is a decision to be made by the PCO, not DCMC.

DCMC's concern about NADOC's PCOs did, however, highlight an inefficiency in NAVAIR's dispute process. The DCMC ACOs are fully qualified to render contracting officers' final decisions. By delegating authority to the ACO, NADOC can be removed from the chain and the process shortened. Given the experience of DCMC's ACOs, there is no reason to expect that the quality of the decisions would decrease.

Inefficiencies aside, it is the researcher's opinion that NAVAIR's disputes process will continue to be effective when DCMC assumes WAD administration.

3. Competing Depots

As discussed earlier, the addition of another Service's depot creates a potential conflict of interest with AIR-02 as the final dispute authority. This appearance of conflict of interest should be addressed by NAVAIR, since it is likely that another Service's depot will win one of NAVAIR's competed awards. In this case a separate decision authority could be identified by NAVAIR and the depot at a post-award conference.

It has been recommended by NADOC that an official from DCMC act as the final decision authority vice AIR-02. This

would remove NAVAIR from the disputes process and remove the appearance of a conflict of interest. AIR-02 is currently unwilling to relinquish all decision authority to DCMC, but might be willing to relinquish decision authority in disputes with other Service depots. [Ref. 14]

DCMC is also concerned that there would be an appearance of a conflict of interest if a DCMC official provided final determination on a dispute involving a DCMC ACO. [Ref. 30] Though there are some potential shortcomings, this idea should not be discarded too quickly by NAVAIR. If utilized, the process would closely resemble that described by administrative arbitration and the depot involved may be entirely comfortable with it.

Though NAVAIR's disputes process may not be as efficient as possible, it is evident that it is effective and can continue to be effective with some changes.

D. APPLIED ADR

Chapter III discussed the background of ADR and some of the forms it can take. However, the key to ADR is that it can take the form that best suits the parties involved. It does not have to fall within specific guidelines or meet certain requirements before it can be called ADR. The FAR describes only four basic elements of ADR:

- (1) Existence of an issue in controversy;
- (2) Voluntary participation of both parties in ADR;
- (3) Agreement on procedures and terms; and

- (4) Participation by officials with authority to resolve the issue in dispute.

When applying ADR to public activities, the researcher would add one more element. The form of ADR chosen must be ethical and represent to the public that justice is being served. With these five elements as a guide, ADR can be applied quite easily to NAVAIR's dispute process. By identifying it as ADR and making changes to maintain a fair and level playing field, NAVAIR will have an available dispute process which is fair, responsive and parallels the FAR requirements.

E. SUMMARY

Thus far public/private competition has been examined for background information. The private dispute process, to include litigation and ADR, has been developed. The public dispute process has also been examined for effectiveness and improvement. It has been shown that NAVAIR's dispute process for the NADEPs is effective and, with changes, this process can be effective for other depots. The avenue through which NAVAIR's dispute process can maintain a fair and level playing field is ADR. By complying with the ADR requirements in the FAR, NAVAIR can show that its process is not only effective, but also fair. This will help prevent another poor review by the GAO.

F. CONCLUSIONS ON RESEARCH QUESTIONS

1. Primary Research Question

What are the key problems associated with resolving disputes between public buying organizations and public performing activities as a result of public/private competition and how can the process be improved?

As discussed in Chapter IV, the key problems associated with the public disputes process are training and a level playing field. Training is necessary because of the inability of the NADEPs to properly document over and above costs, which are the primary source of disputes. Training at the NADEPs is improving over time which promises to reduce disputes from the source.

The level playing field aspect has direct influence on all of public/private. To maintain a fair and level playing field, the public dispute process should mirror the process outlined in the FAR. According to NAVAIR and DCMC, it does not, because it cannot provide for litigation. Though they may be unwilling to recognize it, it is the researcher's opinion that NAVAIR's policy can mirror the FAR in the form of ADR. With changes to be recommended, this process can also be flexible enough to meet external forces from DCMC and other depots.

2. Subsidiary Research Questions

1. What is the current process of disputes resolution when Government agencies are both performing and buying activities?

As discussed in Chapter IV, the current process is delineated by NAVAIR Instruction 4200.35. The NADEP makes a claim to the APO. The NADEP can appeal an unfavorable decision to NADOC and again to AIR-02 if needed. This is an administrative process which essentially uses the NADEP's chain of command.

2. To what extent are disputes being resolved under the current process?

The total number of disputes appealed to AIR-02 is small, which is a good initial indication of the system's effectiveness. The key players in this process are the NADEPs and the APOs and they expressed no major complaints about the process. This again is a good indicator that the process is effective. Additionally, response times have been very good. These indicators show that the process is effective when applied within NAVAIR.

3. What are the problems associated with the current process?

The current process was designed as an internal, administrative form of disputes resolution. Since it does not mirror the FAR, it is open to interpretation concerning the fair and level playing field and its application to other

agencies. This problem can be effectively eliminated if changes are made so that the process clearly mirrors FAR requirements.

4. What modifications can be made to enhance the process?

NAVAIR's process is a generic form of ADR. To maintain the fair and level playing field, changes should be made to improve the process within the broad ADR guidelines in the FAR. Most importantly, they must acknowledge it as a form of ADR and identify it as such in NAVAIR Instruction 4200.35 and in their WADs. Once this is done, changes can be made as required to address changing situations as long as they stay within the guidelines set forth in the FAR.

G. RECOMMENDATIONS

1. As per 5 USC 581(b), each Agency should have a Disputes Resolution Specialist to advise and train personnel in alternate disputes resolution.[Ref. 28:Pg. 478] It is recommended that policy officials at NAVAIR seek this person's assistance.

2. It is recommended that NAVAIR identify in NAVAIR Instruction 4200.35 and in WADs that the disputes process of choice is AD...

3. It is recommended that the finalized form of ADR be agreed upon at the post-award orientation conference.

4. It is recommended that NAVAIR make changes to the current process to address the fair and level playing field and DCMC concerns. This process should then be used as a base form of ADR for NAVAIR. Since this is ADR, changes can be made to suit individual contracts, or even individual disputes if necessary.

H. RECOMMENDATIONS FOR FURTHER RESEARCH

The following areas warrant further research:

1. Public/public competition is growing rapidly among DoD's depots. An evaluation of its effectiveness will aid NAVAIR and the NADEPs in determining their involvement.

2. There appeared to be a lack of interest/knowledge in ADR implementation at NAVAIR. A practical ADR implementation handbook would be a very useful tool for NAVAIR's contracting officers and administrators. An analysis of ADR forms applicable to NAVAIR's public/private process and recommendations for their use should be key research points.

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